

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES DEO HYDE,

Defendant-Appellant.

UNPUBLISHED

June 19, 2003

No. 238389

Kent Circuit Court

LC No. 01-000521-FC

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to twenty-five to forty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant initially argues that the trial court erroneously refused his counsel's request to instruct the jury on involuntary manslaughter. Involuntary manslaughter is a cognate lesser included offense of second-degree murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). Our Supreme Court in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), recently determined that MCL 768.32 only permits a trial court to instruct on necessarily included lesser offenses and not on cognate lesser offenses. The *Cornell* decision applies to the instant case because the issue was preserved and the case was pending on appeal at the time *Cornell* was decided. *People v Alter*, 255 Mich App 194, 200-201, n 1; 659 NW2d 667 (2003). Thus, the trial court properly refused to instruct the jury on the cognate lesser included offense of involuntary manslaughter.

Defendant next contends that there was insufficient evidence to prove that he possessed the requisite *mens rea* for second-degree murder. We disagree. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002)

Second-degree murder is a general intent crime and requires the prosecution to prove the following beyond a reasonable doubt: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice in this context is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that

the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* This Court has determined that malice “can be inferred from evidence that the defendant ‘intentionally set in motion a force likely to cause death or great bodily harm.’” *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

In the instant case, the decedent’s mother heard thumping coming from her daughter’s upstairs apartment that the decedent shared with defendant. The noises lasted for approximately thirty to ninety minutes. The evidence revealed that the decedent had extensive bruising on both sides of her face, multiple bruises to other areas of her body, and injuries to the back of her hands that were consistent with defensive wounds. According to the record, the bruises on her face were most likely caused by at least five blunt force blows from a fist. There was testimony that the pattern of the decedent’s injuries was more consistent with an assault than a simple fall. Several witnesses also claimed that defendant admitted that he must have caused the decedent’s injuries but that he could not remember. Moreover, Krystal Hyde, defendant’s daughter, testified that when she stopped by the apartment that night she heard her father tell the decedent to “get up, bitch.” Ms. Hyde then observed the decedent struggling to get off the floor and back into a chair. “The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences.” *Mayhew*, *supra* at 125. On this record, we find that a reasonable trier of fact could conclude that defendant was guilty of second-degree murder.

Defendant, in propria persona, claims that he was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel’s performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel’s error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In order to demonstrate that counsel’s performance was constitutionally defective, a defendant must overcome the strong presumption that counsel’s performance was sound trial strategy. *Id.* at 600.

Defendant claims that his counsel was ineffective for failing to object to the admission of the decedent’s autopsy photographs. According to defendant, these photographs were more prejudicial than probative. Defendant opines that the photographs were unnecessary to identify the decedent and that they were merely introduced to arouse the sympathy of the jury. He further alleges that some of the photographs showed evidence of medical treatment that had nothing to do with the decedent’s original injuries.

We initially note that all relevant evidence is inherently prejudicial. *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002). MRE 403 allows for the exclusion of relevant

evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Relevant evidence is only unfairly prejudicial within the meaning of MRE 403 when it has an undue tendency to move the jury to decide an issue on an improper, and typically emotional, basis. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). With regard to photographs, this Court has generally concluded that:

photographs that are merely calculated to arouse the sympathies or prejudices of the jury should not be admitted. . . . However, if a photograph is otherwise admissible for a proper purpose, it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime. [*People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997) (citations omitted).]

In the instant case, the admission of the autopsy photographs was proper because they depicted the nature and extent of the decedent's injuries. The probative value of the photographs to show defendant's intent outweighed the danger of unfair prejudice. Moreover, the forensic pathologist explained to the jury that the evidence of medical treatment in the photographs was unrelated to the decedent's original injuries. Thus, we are not persuaded that there was any risk of unfair prejudice by showing the jury these photographs. Because the evidence was relevant and not unfairly prejudicial, any objection would have been futile. Counsel is not required to advocate a meritless position. *Snider, supra* at 425.

We also find no merit to defendant's claim that his counsel erred in failing to object to the admission of the decedent's shirt and defendant's watch into evidence. The decedent's daughter and son-in-law discovered these items at the crime scene one week after the incident. The prosecution laid a proper foundation for the admission of both items, and admitted them into evidence through an expert in forensic science who conducted DNA testing on both items.¹ See *People v Slaton*, 135 Mich App 328; 339-340; 354 NW2d 326 (1984) (admission of bloodstained shoes proper in murder trial); *People v Peery*, 119 Mich App 207, 211-212; 326 NW2d 451 (1982) (admission of bloodstained boot proper in robbery trial). Thus, an objection to the admission of this evidence would have been futile. Again, we note that defense counsel is not required to advocate a meritless position. *Snider, supra* at 425. Given the overwhelming evidence in this case, defendant has failed to establish a reasonable probability that but for his counsel's alleged error, the result of the proceedings would have been different. *Carbin, supra* at 600.

Defendant ultimately contends that his counsel was ineffective for "pleading him guilty." At trial, defense counsel conceded that the decedent most likely died because of defendant's actions, but argued that defendant did not possess the requisite intent for second-degree murder. While defendant admits that his counsel's statements were a form of trial strategy, he claims that he never agreed to such a strategy. A lawyer is not considered ineffective for conceding certain

¹ We note that the expert witness testified that the blood on the shirt matched the decedent's DNA types. She further stated that there were at least two DNA donors on the watch. The expert identified defendant as the major donor of DNA on the watch and she could not rule out the decedent as the second donor.

points at trial, including conceding guilt of a lesser offense. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). There was overwhelming evidence in this case indicating that defendant severely beat the decedent. Thus, it is reasonable to conclude that defendant's counsel made a tactical decision to focus his argument on defendant's intent at the time of the crime. This Court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood